# BAIL BOND FAIRNESS ACT OF 2001

## HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

## COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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ON

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# BAIL BOND FAIRNESS ACT OF 2001

**TUESDAY, OCTOBER 8, 2002**

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 4:06 p.m., in Room 2237, Rayburn House Office Building, Hon. Lamar S. Smith [Chairman of the Subcommittee] presiding.

Mr. SMITH. The Subcommittee on Crime, Terrorism, and Homeland Security will come to order. We will start with opening statements and then we will get immediately to our expert witnesses, and I recognize myself for an opening statement.

Today's hearing is on H.R. 2929, the Bail Bond Fairness Act of 2001. This legislation limits the circumstances for which bail can be forfeited. Bail set by a judge in Federal court typically includes provisions that require a defendant to make all court appearances and meet other conditions, including a requirement that the defendant "break no laws."

This bill was introduced in response to a 1995 decision by the Ninth Circuit. Under this legislation, a Federal judge is not allowed to forfeit bail bonds except in cases where the defendant actually fails to appear physically before a court as ordered. Forfeiture is not permitted when the defendant violates some other condition of release.

Our witnesses are here to shed light on two issues relevant to this legislation. The first issue is the extent to which Federal judges have ordered the forfeiture of bail for violations of conditions of release other than appearance in court. The second issue is whether Federal judges should be prohibited from ordering such a forfeiture.

I thank our witnesses for being here today. We have the exact right two witnesses, I think, one on each side of the equation, and we look forward to their testimony.

At this time, I will recognize the gentleman from Virginia, the Ranking Member, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I am pleased to join you in convening this hearing on the Bail Bond Fairness Act of 2002. I believe in the concept that a defendant is entitled to be considered innocent until proven guilty. Being freed during pendency of trial is vital to a defendant being in a position to aid his or her own defense. Bail is the process by which defendants are generally released during pendency of trial.

One way through which the defendant is able to remain free during a pendency of trial is having a surety on a bail bond. The surety may be cash, such as a bail bondsman, or asset-based, such as through a family home. Traditionally, bonds are used to assure the defendant's appearance for court proceedings. However, under current court rules, the surety on the bond may be deemed forfeited if the defendant violates any condition of his or her release.

I am a cosponsor on this bill because I am concerned that we have put a chill on that mechanism and, therefore, the prospects of release for some defendants because if we subject the surety to forfeiture for violations of conditions, they may not want to grant the bond, or go on the bond. I am also concerned that it places an unfair and duplicative burden on those who provide the surety, whether family or commercial provider, to require them to assure compliance by the defendant with all conditions of the release.

This approach appears similar to the approach of forcing the entire family out of public housing if one family member, whether in the housing or not, is found in possession of drugs, even though the family may have no control over that family member's activities. I don't understand why requiring forfeiture of the bond is necessary. In addition to the threat of loss of freedom, the court also has pretrial supervision officers whose job it is to monitor the compliance of the defendant, and that defendant will be in court to be subjected to those sanctions. Otherwise, the bond can be forfeited because the defendant didn't show up.

So, Mr. Chairman, given those questions and concern, I look forward to the testimony of our witnesses for enlightenment.

Mr. SMITH. Thank you, Mr. Scott.

We have also been joined by the gentleman from Georgia, who happens to be the original sponsor of this legislation, Mr. Barr, and he is recognized for an opening statement if he would like to be.

Mr. BARR. Thank you very much, Mr. Chairman. I am sure I echo the sentiments of the other Members of the Subcommittee in thanking you for convening this hearing. I very much appreciate the distinguished witnesses being with us today.

This is not a new topic. We have had hearings in prior Congresses on this issue, but with each year that passes, it is my impression from talking with many in the bail bond industry, as well as judges, as well as attorneys who are concerned with the efficient functioning of our judicial system—and the bail bonding aspect is a very crucial part of that—the problem grows not less important but more important.

The decision in Vacarro, we believe, is one that unduly restricts and restrains the proper functioning of the bail bond system, and I think that in the absence of having clear Congressional intent reflected in legislation such as is before us today or in some other legislation that similarly addresses the problem of appearance bonds, which is the purpose, as I understand it, from having been both a prosecutor and defense attorney, the purpose of a bail bond, essentially, and that historically is true in our country, which has become, because of the Vacarro decision, essentially performance bonds or condition bonds, in which case the bail bond agent assumes liability for anything from the type of person that the defendant associates with, to how they behave in their home, to all

sorts of other aspects, other than the appearance. It has created, as I understand it, demonstrably serious problems in the proper functioning of the bail bond system, at least as it is applicable to Federal criminal proceedings.

The legislation that is before us today enjoys bipartisan support on this Subcommittee as well as on the Judiciary Committee itself. It is very specifically tailored. It simply addresses this aspect of rule 46(e). I think that it does not sweep too broadly.

I recognize that the powers that be, whatever those powers are, it is always difficult once a certain procedure is set into to move or effect change, but I do believe that the very narrow scope, Mr. Chairman, of what we are proposing today in this legislation is very much in keeping and provides the proper balance between the role of the judiciary and our distinguished jurists, both at the Federal District Court level as well as our magistrate courts and on appeal, the Courts of Appeal and the Supreme Court, but it also reflects the reality that the aftermath that we are having to live with in the Vacarro decision really is unduly limiting and, in a sense, basically eroding the very foundation of bail bonds in our Federal system in a way that I don't think, at least I hope not, was intended by the Vacarro decision. But that is, in fact, what it seems to have turned out to be.

So I think this legislation simply gets us back where we had been for many, many years and it does, I feel very strongly, properly reflect the balance that we need in our system. It does not in any, I do not believe, in any way, shape, or form erode very important power and role of the judiciary, but it does simply get us back to where we had been and, I think, really need to be, and that is to have a viable bail bond system in our Federal criminal system.

We have to focus our energies on appearances, the appearance bond, that is, and not continue to create tremendous liability and, therefore, a disincentive for bail bonding companies and agents in their profession to provide these services that are necessary to ensure that, to the extent possible, consistent with the safety of the community and the Federal rules and judicial precedent, we will have individuals to be able to properly secure bonds during the pendency of the action against them.

So I hope this hearing moves us down the road toward a more balanced, realistic understanding of this problem and that we can eventually, hopefully, sooner rather than later, rectify this with this legislation, which, again, we have tried to craft it very narrowly and properly, reflective of the equities involved on the judiciary side as well as on the prosecution side as well as with regard to the role of the bail bond agent, which basically crosses both sides.

So thank you very much again, Mr. Chairman and other Members of the Committee, for supporting this and for having this hearing, and I would like to once again thank our distinguished panelists who we will hear from today.

Mr. SMITH. Thank you, Mr. Barr.

We will go to our witnesses, and I will introduce them now. They are the Honorable Edward Carnes, Judge, United States Court of Appeals for the 11th Circuit, and Chairman, Advisory Committee

on Criminal Rules, United States Judicial Conference; and Richard Verrochi, President, Professional Bail Agents of the United States.

We welcome you both, and Judge Carnes, we will begin with your testimony.

**STATEMENT OF HONORABLE EDWARD CARNES, JUDGE, UNITED STATES COURT OF APPEALS FOR THE 11TH CIRCUIT, AND CHAIRMAN, ADVISORY COMMITTEE ON CRIMINAL RULES, UNITED STATES JUDICIAL CONFERENCE**

Judge CARNES. Thank you, Mr. Chairman, Mr. Scott, Mr. Barr, and staff. I appreciate the opportunity to be here and to represent the Judicial Conference of the United States in its opposition to this legislation. Given the brevity of time for remarks, I will rely primarily on my written testimony and seek to make two points in my oral remarks.

The first is that this legislation is based on factual premises that are simply not true and that are demonstrably not true. Section 2(a)(5) states as a predicate for the legislation that, "In the absence of a meaningful bail bond option, thousands of defendants in the Federal system fail to show up for court appearances each year." It is not true that there is no viable bail bond option in the Federal system. Each year, thousands of defendants are released on unsecured bonds, on cash bonds, on the posting of other collateral, and some even on the posting of surety bonds. We have supplied the Committee with a chart showing those numbers. Seventy-five percent of the people who are released are released on bond. The other 25 percent are released on personal recognizance.

All of the bonds that I have mentioned, the types of bonds are viable bail bond options. It is not true there are no viable bail bond options in the Federal system, nor is it true that thousands of defendants in the Federal system fail to show up each year. As the table incorporated in my written testimony reflects, last year, of 38,000 defendants released, only 878, or 2.3 percent of them, failed to show. That is a no-show rate that I believe would be the envy of any system anywhere. The table also shows for the past 10 years, the no-show rate has never been above 3 percent. It has never been 1,000, much less thousands.

The Federal criminal system does not lack viable bail bond options and it does not have a serious problem with no-show defendants.

The second point I would like to make is to urge you to please consider these decisions that you are thinking about overruling. Section 2(a)(3) targets for disapproval and for overruling one specific decision. That was the Vacarro decision. I invite your attention to that.

The appellant in Vacarro was not a surety company. The appellant was the defendant, John Joseph Vacarro. He had committed some crimes, including racketeering, and had been convicted of them. He was released on bond pending appeal. He signed a surety bond along with a surety, which is a common practice, making himself jointly and severally liable.

One of the conditions expressly incorporated into it was that that he commit no crimes while he was out on bond pending appeal. He proceeded to commit very serious crimes. He committed conspiracy,

distribution of cocaine, extortion, and racketeering. The District court revoked his bond. He appealed. The surety company filed a late notice of appeal and was dismissed. It wasn't even in the case on appeal.

So the appeal case decided, the decision you are wanting to overturn, Vacarro, decided that Mr. Vacarro himself should suffer the loss of his liability on that bond because he committed a half-dozen or more very serious crimes. I think there are few people who, upon reflection, would disagree with the position that the Ninth Circuit had in that case, which was compelled by the wording of 46(e).

A similar case decided the very same year in the Second Circuit in New York, the Gigante case, illustrates the same point. Vincent Gigante was the head of the Genovese crime family. He was a mob boss who was pending trial on crimes he committed in his position as mob boss. He got released on pretrial release for $1 million in bond, secured by the houses of his three children and their spouses. The judge says, I want you to know up front, I am going to forfeit that bond, they are going to lose their houses, if you commit any crimes while you are out pending release pending trial.

Mr. Gigante couldn't bear the thought of him being impeded in the commission of his crimes while he was released pending trial, so he appealed that decision. No commercial surety is in it. He asked the Second Circuit, please tell the District court they can't make my bond conditioned on me behaving pending trial. All they can make it conditioned on is me showing up, me appearing. Don't threaten me with the loss of my children's homes if I commit some more serious crimes. The Second Circuit rejected his position.

My point is that John Joseph Vacarro and Vincent Gigante would applaud this legislation because both of them would have won their appeals. Mr. Gigante would have been told, go ahead and commit your crimes. It is not going to jeopardize your children's homes. That is a bad policy position. The Judicial Conference of the United States opposes it, and I will be glad to answer any questions that the Committee may have.

Mr. SMITH. Thank you, Judge Carnes.

[The prepared statement of Judge Carnes follows:]

PREPARED STATEMENT OF THE HONORABLE EDWARD CARNES

Good afternoon Mr. Chairman. I appreciate the invitation to testify today on behalf of the Judicial Conference of the United States, regarding H.R. 2929, the "Bail Bond Fairness Act of 2001." My name is Ed Carnes. I am a circuit judge on the United States Court of Appeals for the Eleventh Circuit with my chambers in Montgomery, Alabama, and I am here in my capacity as Chair of the Conference's Advisory Committee on Criminal Rules ("advisory committee").

The Judicial Conference of the United States opposes H.R. 2929, because this legislation would impair the authority of federal courts to enforce conditions of release prior to trial, including conditions that may be essential to public safety. We also oppose H.R. 2929 because it directly amends the Federal Rules of Criminal Procedure, thereby overturning the results of the rulemaking process, a process that was established by Congress in the Rules Enabling Act, 28 U.S.C. §§ 2071–77. Finally, we want to set the record straight about some factual issues addressed in the "Findings and Purposes" in Section 2 of the bill.

BAIL REFORM ACTS OF 1966 AND 1984

The Bail Reform Acts of 1966 and 1984, codified at 18 U.S.C. § 3142 et seq., set out the Congressional policy governing the pretrial release of an accused. Both Acts disfavor pecuniary bail and the existing law instead favors other safeguards that both ensure the public safety and the defendant's appearance at court proceedings

when required. Both Acts provide wide discretion to courts in setting pretrial conditions of release. Consistent with the expressed policy of these Acts, commercial bail bondsmen have been used in only a small fraction of cases.

Section 2 of the Bail Reform Act of 1966 revised bail practices to assure that all persons, regardless of their financial condition, would not needlessly be detained pending their appearance in court, when detention served neither the ends of justice nor the public interest. "Danger to the community and the protection of society were not to be considered as release factors" under the 1966 Act. S. Rep. No. 225, 98th Cong., 2d Sess. 3, reprinted in 1984 U.S. Code Cong., & Adm. News 3182, 3187.

The 1984 legislation amended the Bail Reform Act to expand the discretion of a court in setting release conditions. The Senate Judiciary Committee reported that: "Many of the changes in the Bail Reform Act incorporated in this bill reflect the Committee's determination that Federal bail laws must address the alarming problem of crimes committed by persons on release and *must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released*. The adoption of these changes marks a significant departure from the basic philosophy of the Bail Reform Act, which is that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings." S. Rep. No. 225, 98th Cong., 2d Sess. 3, reprinted in 1984 U.S. Code Cong., & Adm. News 3182, 3185–3186. (emphasis added)

The Bail Reform Act, as amended in 1984, requires a court to determine whether there is any condition or combination of conditions that will reasonably assure that the defendant will appear in court as required, and at the same time assure the safety of others in the community while the defendant is free pending trial. It contains a Congressionally mandated preference for imposing the least restrictive bail condition on a person charged with a non-capital offense who must be released "on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. § 3142(b).

The Bail Reform Act sets out thirteen specific conditions of release, which can be imposed by a court separately, in combination, or as hybrid versions, but only if the court finds that release on personal recognizance or on an unsecured appearance bond is inadequate. In fact, the majority of the 38,000 defendants released in fiscal year 2001 were released on the two least restrictive conditions, either personal recognizance or an unsecured appearance bond.

Accordingly, unless a court imposes other conditions, an accused is released on personal recognizance by promising only to make all further court appearances as required and not to commit crimes while on bond. There are no financial conditions. If not released on personal recognizance, an accused may be released on an unsecured personal bond. This is not a commercial bond. Rather, an unsecured personal bond is a promise by the accused to pay into court a specified sum of money if the accused fails to appear as required. A court's determination to release an accused on an appearance bond of this type means that the accused will be released without deposit of cash bail or collateral in most cases. Release on personal recognizance or on an unsecured appearance bond were available prior to 1966, but the 1966 legislation created a strong policy in favor of their use.

In practice, the requirement of obtaining a co-signer for an unsecured bond often serves as an upgraded form of release preferable to one of the other alternatives listed in the Act. A co-signer may be a family member or a friend, preferably employed or owning sufficient assets to make the financial undertaking of the bond a meaningful undertaking. It is particularly in these cases in which the forfeiture of a bond for breach of a condition of release, other than for failing to appear, becomes an important additional tool for the judge to protect the public safety.

Commercial bail bond is listed in the Act as the twelfth condition of release. A court has noted that the structure of the statute makes the conventional bonds of professional bondsmen the least desired condition. *United States* v. *Gillin*, 345 F. Supp. 1145, 1147 (S.D. Tex. 1972). Others have advocated the abolishment of this alternative condition altogether, which was seriously considered during Congressional debate of the 1984 legislation. (*ABA Standards for Criminal Justice*, 2ed. 1980, § 10–5.5 says: "Compensated sureties should be abolished. Pending abolishment, they should be licensed and carefully regulated.") If used, the "obligation of commercial sureties to assure the appearance of their clients, and, if necessary, *actively to maintain contact with them during the pretrial period, is emphasized*." S. Rep. No. 225, 98th Cong., 2d Sess. 3, reprinted in 1984 U.S. Code Cong., & Adm. News 3182, 3185–3198.

THE PRESENT SYSTEM AND WHAT H.R. 2929 WOULD DO TO IT

Section 3142 of Title 18 authorizes the conditional pretrial release of defendants in the federal criminal system. Where a federal judicial officer determines that release of the defendant on personal recognizance or on an unsecured appearance bond will not reasonably assure that defendant's appearance or will endanger the safety of anyone in the community, section 3142(c) expressly provides for conditions on release, and it lists as examples thirteen types of conditions that may be imposed. One available condition is that the defendant, or others acting on the defendant's behalf, execute a property or secured bail bond. Among the other conditions that may be imposed are that the defendant not possess a firearm, avoid all contact with the victim and witnesses to the crime, refrain from the use of alcohol and illegal drugs, stay away from certain places and people, and observe a curfew. The statute also provides that the judge may order the defendant to "satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person in the community." Rule 46(e) of the Federal Rules of Criminal Procedure sets out the procedure relating to forfeiture of surety bonds and to setting aside or remitting of any forfeiture.

Section 3 of H.R. 2929 would eliminate the power of a federal judge to forfeit bail, including a bail bond, for failure to satisfy a condition of release, other than failure to appear before the court. It would rule out the use of forfeiture or the threat of forfeiture to enforce conditions of release that are necessary to assure the safety of innocent people and the community as a whole. While the impetus for this legislation comes from professional bail bond interests, its provisions are not limited to cases in which they put up the surety bond, or even to cases in which there is a surety bond.

Last month, the Judicial Conference formally resolved to oppose legislation that would amend Rule 46 to restrict a judge's power to forfeit a bail bond to instances where the defendant fails to appear before the court. This Conference position followed a careful examination by the advisory committee of Rule 46(e) and of the consequences of removing the authority of judges to forfeit bonds for reasons other than failure to appear, as H.R. 2929 would do.

Shortly after the previous chair of the advisory committee, Judge W. Eugene Davis, testified before this Subcommittee on March 12, 1998 regarding an earlier version of this bill,[1] the advisory committee undertook a study of the proposal. As part of that study, we conducted a survey of magistrate judges, the front-line judicial officers who preside over virtually all of the proceedings governing the pretrial release of defendants in the federal system. The study revealed that Rule 46(e) is working well in its current form.[2]

In a large majority of the ninety-four federal districts bonds are forfeited only if the defendant fails to appear at a scheduled proceeding. In some districts, however, courts do incorporate conditions of release as part of the bail bond and may forfeit bonds for violations of those release conditions. In those districts, the magistrate judges believe that subjecting the posted assets of the defendant, or of a friend or relative of the defendant, to risk if the defendant violates a non-appearance condition of release significantly increases the probability that the defendant will comply with all the release conditions. Absent this added assurance, these magistrate judges would be more reluctant to release a particular defendant. They report that they might well decide to retain a defendant in custody instead of exposing the court and innocent members of the community to the greater risk that the defendant will violate a significant release condition, such as refraining from drug use. In fact, some defendants themselves have suggested that their bond be subject to forfeiture if they fail to abide by the release conditions as a means of persuading a judge to release them. Amending Rule 46(e), as H.R. 2929 proposes, could have the unintended consequence of causing some defendants who would otherwise have been released to be detained instead.

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[1] H.R. 2134, 105th Cong., 1st Sess. (1997).

[2] As a result of the study, at its April 1998 meeting the advisory committee declined to recommend amending Rule 46(e). On May 7, 1998, Judge Davis wrote to the Honorable Bill McCollum, then Chairman of the Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives, with copies to the Subcommittee members, advising him of the study and actions taken. In response to a letter, dated May 22, 2002, from the Honorable F. James Sensenbrenner, Jr., Honorable John Conyers, Jr., Honorable Lamar S. Smith, and Honorable Robert C. Scott, Members of the Committee on the Judiciary, U.S. House of Representatives, to Chief Justice William H. Rehnquist, requesting the views of the Conference on H.R. 2929, the advisory committee again considered this issue and reaffirmed its opposition to the legislation at its meeting in April 2002. The Conference subsequently adopted the advisory committee's recommendation in September 2002.

Magistrate judges report that they routinely impose a condition of release that prohibits the defendant from contacting specific individuals. This release condition is often essential to protect the safety of witnesses in large drug cases, ex-spouses and domestic partners of defendants with prior histories of drug abuse, spouses and family of defendants charged with felony sexual abuse, child abuse, or domestic violence. The current Rule 46(e) provides judges with the valuable flexibility to impose added safeguards in appropriate cases ensuring a defendant's compliance with these and other conditions of release by subjecting a bail bond to forfeiture on a breach of these conditions of release. Judges have found that the added supervision provided by the friend, family member, or bondsman whose posted bond becomes subject to forfeiture if the defendant breaches a condition of release is an effective insurance deterring the defendant's misbehavior.

Some defendants gain their release by posting their own cash or property as bail. Others have relatives or close friends post their property or act as sureties for the defendant. As the Bail Reform Act intended, significantly more federal defendants secure their release by putting at risk their own money or property or persuading a relative or friend to do so, than use corporate sureties or bail bonds firms. When defendants themselves or their families or friends put up the collateral, and it is at risk of forfeiture for failure to comply with non-appearance conditions, the defendant has a powerful incentive to comply with those incentives. The defendant has a powerful incentive to observe a curfew or travel restriction, to stay away from a victim, or to stay away from alcohol, drugs, or convicted felons, and to obey whatever other conditions a judge has imposed for the safety of the community. H.R. 2929 would remove that powerful incentive by amending Rule 46(e)(1), which now provides for forfeiture of the bail if there is a breach of any condition of the bond, so that bail could be forfeited only if the defendant fails to appear. And that would be true no matter what the bail is or who put it up.

Consider, for example, a defendant who puts up his own cash or property as bail, and among the conditions imposed are that he not possess a firearm and that he stay away from the victim of the charged crime or any witnesses. Would we not want the defendant's own posted cash or property to be at risk if he threatened with a firearm the victim or a witness? Under the existing rule, a judge could order that the cash or property the defendant posted be forfeited if the defendant committed that kind of serious breach. If H.R. 2929 is enacted, the judge will be powerless to forfeit any bail bond regardless of who put it up and regardless of how serious the defendant's breach of a non-appearance condition is.

The effects of the proposed legislation extend to third-party custodian sureties, such as family members. If their property is at risk when the defendant violates curfew or starts using drugs or begins carrying a firearm, they will exert pressure on the defendant to straighten up, or they may surrender a misbehaving defendant into custody to avoid jeopardizing their property. By insulating their property from any risk for the defendant's failure to adhere to non-appearance conditions, H.R. 2929 would remove a major incentive for third-party custodian sureties to exert influence over a released defendant's behavior.

Even with corporate sureties, who obviously lack a custodial or family relationship with the defendant, the threat of forfeiture of the bond can provide an incentive to keep tabs on the defendant to insure that he does not leave the territory to which he is confined, obeys a curfew, and so forth. To the extent that corporate sureties cannot effectively police a defendant's compliance with non-appearance conditions, their inability to do so can be taken fully into account by the judge in deciding whether to set aside or remit some or all of any forfeiture. Rule 46(e)(2) & (4) provide for the setting aside or remission in whole or part of any forfeiture "if it appears that justice does not require the forfeiture."

In summary, Rule 46(e) as it now exists provides federal judges with the important flexibility to impose added safeguards to ensure a defendant's compliance with conditions of release. Removing that flexibility, which is what H.R. 2929 would do, may jeopardize public safety and the proper functioning of the federal criminal justice system. Federal courts should retain their full authority to enforce all conditions of pretrial release.

## THE RULES ENABLING ACT

Because H.R. 2929 would directly amend one of the Federal Rules of Practice and Procedure, its enactment would contravene the rulemaking process established by Congress under the Rules Enabling Act, 28 U.S.C. §§ 2071–77. Under that important Act, proposed amendments to federal court rules are subjected to extensive scrutiny by the public, bar, and bench through the advisory committee process, are carefully considered by the Judicial Conference, and then are presented after ap-

proval by the Supreme Court to Congress. It is an exacting and deliberate process designed to ensure that careful thought and consideration is given to any proposed amendment of the rules so that lurking ambiguities can be unearthed, inconsistencies removed, problems identified, and improvements made. Direct amendment of the federal rules through legislation, even when the process is complete, circumvents the careful safeguards that Congress itself has established.

THE RATE OF FAILURES TO APPEAR IN THE FEDERAL SYSTEM

Section 2 of H.R. 2929 contains the bill's proposed "Findings and Purposes." Section 2(a)(5) states:

> In the absence of a meaningful bail bond option, thousands of defendants in the Federal system fail to show up for court appearances every year. When this happens, the expense and effort by Federal law enforcement officers to investigate and apprehend defendants is wasted and the overall interests of justice are thwarted.

This statement has no basis in fact. It is contrary to fact.

The federal criminal justice system has a track record of ensuring appearance in court by defendants that would be the envy of many judicial systems in the Free World. As the table below shows, in fiscal year 2001, federal pretrial services closed 38,050 cases involving criminal defendants who had been released into the community. Of those cases, only 878, or a mere *2.3 percent*, failed to appear. In fiscal year 2000, of the 37,607 defendants released to the community, only 893, or a mere *2.4 percent*, failed to appear. In 1999, of 37,439 defendants released to the community, only 920, or a mere *2.5 percent*, failed to appear. The table reflects that similar records have been produced by the federal system year after year.[3]

[3] It may be that H.R. 2929's reference to thousands of defendants who fail to show up for court appearances in the federal system each year includes petty offenders who voluntarily and with the blessing of the local federal court pay a fixed sum (usually through the mail) in lieu of an appearance. There are tens of thousands of minor offense cases in which that happens each year. Examples include speeding or other traffic offenses on a federal reservation, and more specific local examples include speeding on the George Washington Parkway and illegal parking at the Pentagon. Our federal court system could not withstand the weight of personal appearances in tens of thousands of such minor cases each year, and so, pursuant to Rule 58(d)(1), we allow the "defendants" in those cases to mail in a payment, equivalent to a fine, in lieu of appearing. The change H.R. 2929 proposes in the authority of judges to forfeit bail under Rule 46(e) would not affect any of those minor cases in which defendants send in payments in lieu of appearing pursuant to Rule 58(d)(1). It would be irrational to consider those thousands of not only permissible but also invited and welcomed non-appearances in minor cases as "no shows" relevant to any meaningful discussion of Rule 46(e).

**FAILURES TO APPEAR AMONG RELEASED FEDERAL DEFENDANTS**

| Fiscal Year | Number Released | Number of Failures to Appear | Percent Failing to Appear |
|---|---|---|---|
| 1992 | 31,330 | 863 | 2.8% |
| 1993 | 29,196 | 728 | 2.5% |
| 1994 | 30,336 | 841 | 2.8% |
| 1995 | 29,147 | 804 | 2.8% |
| 1996 | 30,631 | 807 | 2.6% |
| 1997 | 33,378 | 926 | 2.8% |
| 1998 | 35,211 | 838 | 2.4% |
| 1999 | 37,439 | 920 | 2.5% |
| 2000 | 37,607 | 893 | 2.4% |
| 2001 | 38,050 | 878 | 2.3% |

*Source:* Annual Report of the Director, Administrative Office of the United States Courts, Table II-9 (1992); Table 11 (1993-1997); Tables 11 and 11A (1998-2001).

Much of the credit for the exceptional record reflected in these statistics can be given to the federal pretrial services system—a vital part of the federal judiciary. Our professional federal pretrial services officers ("PSOs") give the courts the means to allow defendants to remain in the community, to manage them, and to compel them to remain law abiding. [4]

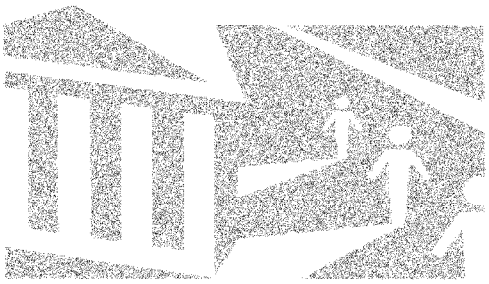
Our PSOs serve as the court's fact finders, investigating the backgrounds of defendants and recommending conditions under which the court may safely release defendants to the community. They enforce the court's orders, supervising defendants by monitoring their activities in the community. During supervision, PSOs hold defendants accountable for their actions and responsible for their obligations. They direct defendants to court-ordered services—such as substance abuse testing and treatment, mental health treatment, training, or employment assistance—to help them function as responsible members of society.

Perhaps most importantly, PSOs help ensure public safety and well being. By monitoring the activities of defendants in the community, PSOs manage any risk they may pose either to individuals or to the public in general. Their important work is crucial to the fair administration of justice in the federal system. I have attached to this statement, for your review, a copy of the 2001 Year-in-Review Report, prepared by the United States Probation and Pretrial Services System, providing detailed statistics regarding our pretrial services program and a profile of cases they handled last year. For their impressive track record, they should be recognized and commended. And the record should be set straight. I repeat once more for emphasis: The statement in H.R. 2929 that "thousands of defendants in the Federal system fail to show up for court appearances every year" is simply not true.

Once again, I thank you for the opportunity to appear before you today. I would welcome any questions you might have about this issue.

[4] While 37 of the 94 federal judicial districts have a separate pretrial services organization, in the remaining districts pretrial services and probation are administered as part of a unitary office with probation officers carrying out both probation and pretrial services functions.

**United States Probation and Pretrial Services System**



# Year-in-Review Report

**Fiscal Year 2001**

United States Probation and Pretrial Services System

# Year-in-Review Report

Fiscal Year 2001

Prepared by the Office of Probation and Pretrial Services,
Administrative Office of the United States Courts,
in cooperation with the Chiefs Advisory Group

May 2002

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## Introduction

Serving 94 judicial districts in 500 locations across the country, the 8,000 men and women of the United States Probation and Pretrial Services System form a vital part of the federal judiciary. Investigation and supervision are the two core responsibilities of United States probation and pretrial services officers. Officers investigate and supervise persons at two pivotal points in the justice process—defendants who are charged with a federal crime and awaiting their day in court and offenders who have been convicted of a federal crime and conditionally released to the community on probation, parole, or supervised release.

This is important work, crucial to the fair administration of justice. Detention or imprisonment is not necessary or appropriate for some individuals charged with or convicted of crime. The system offers an alternative to jail or prison for these persons and also provides the courts with a way to monitor persons who are released to the community after serving time in prison and help them to reintegrate into the community. The system gives the courts the means to allow defendants and offenders to remain in the community, to manage them, and to compel them to remain law abiding.

In carrying out their duties, probation and pretrial services officers provide services that impact the courts, the defendants and offenders who come before the courts, and the public.

**The Courts.** Officers serve as the courts' fact finders. They provide the courts with important information on which the courts rely in making release and sentencing decisions. Officers investigate the backgrounds of defendants and offenders to determine such things as their employment, finances, health, and criminal history and prepare reports to the courts based on these findings. Officers recommend conditions under which the courts may safely release defendants and offenders to the community.

**Defendants and Offenders.** Officers enforce the courts' orders. At the courts' direction, they supervise defendants and offenders by monitoring their activities in the community. During supervision, officers hold defendants and offenders accountable for their actions and responsible for their obligations. Officers work with defendants and offenders to change the behavior that contributed to their criminality and intervene to correct their behavior if necessary. They direct them to court-ordered services—such as substance abuse testing and treatment, mental health treatment, training, or employment assistance—to help them function as responsible members of society.

**The Public.** Officers help ensure public safety and well being. By monitoring the actions and activities of defendants and offenders in the community, officers manage any risk they may pose either to individuals or to the public in general. Supervising defendants and offenders in the community is far less costly than incarcerating them and thus saves taxpayer dollars.

The Office of Probation and Pretrial Services, Administrative Office of the United States Courts, in cooperation with the Chiefs Advisory Group, prepared this year-in-review report. The Chiefs Advisory Group gives advice and assistance to the Office of Probation and Pretrial Services, which oversees and supports the system. The report highlights the system's successes and accomplishments for fiscal year 2001. It presents national statistics and also describes initiatives that affect the entire system. We hope the report gives you an understanding of the system and an appreciation of the role it plays in the justice process.

John M. Hughes
Assistant Director
Office of Probation and Pretrial Services,
Administrative Office of the United States Courts

Kenneth Laborde
Chief Probation Officer,
Eastern District of Texas
Chair, Chiefs Advisory Group

## National Statistics

### I. PRETRIAL SERVICES

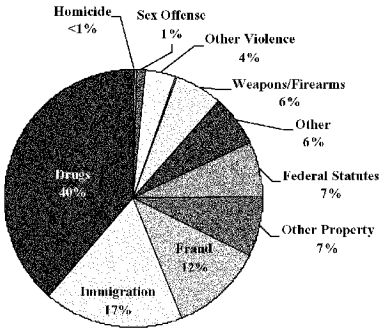
### A. Pretrial Services Case Activations

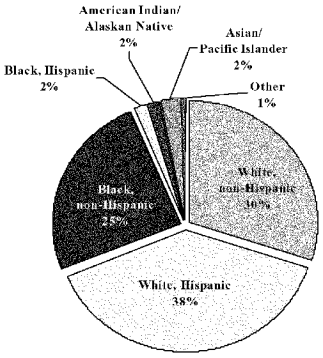
**Population Size and Composition**

There were 86,140 defendant cases activated during fiscal year 2001. This represents less than a one (1) percent increase over the 85,617 activations during the previous year.

*Nature of the Charge*

Drug offenses represent the largest single type of charge filed, followed by immigration and fraud. The proportional representation of each charge type is within one percentage point of the charge profile for fiscal year 2000.

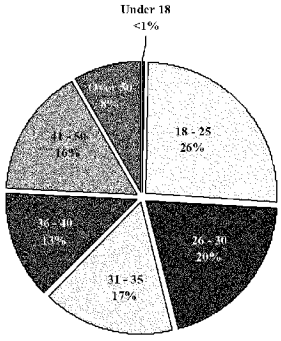



*Demographics*

The fiscal year 2001 defendant population is 84 percent male—identical to the gender profile in fiscal year 2000. There is also virtually no change in the population's race and ethnicity, with white Hispanics representing the largest single race/ethnicity category.

The plurality of defendants falls into the 18-25 age range, but a quarter are over 40 years old. The age profile is similar to that for fiscal year 2000 except that there were proportionately fewer defendants in the "over 50" group, but more in the 41-50 group.



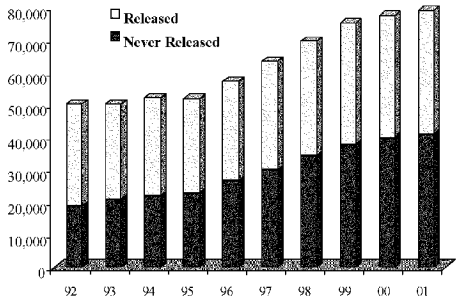
### B. Pretrial Services Supervision

Title 18 § 3142 requires judicial officers to order the release or detention of federal defendants pending trial under circumstances determined to be the least restrictive necessary to reasonably assure that the defendant will appear in court for all further proceedings and not endanger the safety of any other person or the community. Among the release conditions that may be imposed is pretrial services supervision.

**The Supervision Population**

During fiscal year 2001, 33,033 defendants were received for pretrial services supervision. An additional 2,049 were placed on pretrial diversion supervision, for a total population of 35,082. This represents a one-and-one-half percent increase over the number received for supervision in fiscal year 2000.

The number of defendants under pretrial services supervision is considerably lower than the number of pretrial case activations because approximately 20 percent of the defendants are released on their personal recognizance (without a condition of pretrial services supervision) and the majority are detained.




Of the 79,129 cases closed during the year, 52 percent were never released at any time between arrest and the conclusion of their cases. This equals the "detained—never released" rate in fiscal year 2000, which was the highest in the last 10 years—the result of a small but steady increase since fiscal year 1992 when the rate was 38 percent.

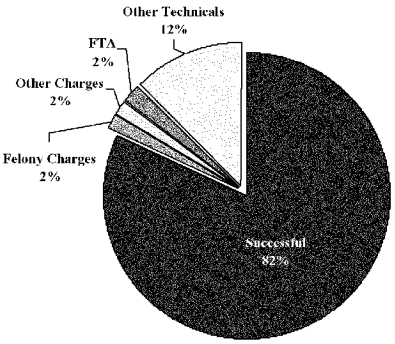
**Other Alternatives to Detention**

In addition to pretrial services supervision *per se*, the court may order other release conditions as alternatives to detention that are implemented and monitored by pretrial services officers. By far the most common of these is testing for the use of drugs or alcohol, a condition imposed on 19,434 defendants—over three-quarters of those under supervision during fiscal year 2001. Further, this year 5,841 defendants received substance abuse treatment from local providers under contract to federal probation and pretrial services offices—up seven percent from the previous year. Fewer defendants (1,116) received mental health treatment, but this represents a steep increase of 30 percent over fiscal year 2000. Among the other types of additional release conditions implemented by pretrial services this year were the electronic monitoring of home confinement restrictions imposed on 3,538 defendants and the placement of 1,360 defendants in shelter facilities.

**Pretrial Release Outcomes**

In fiscal year 2001, pretrial services closed 38,050 cases involving defendants who had been released to the community.

Of those defendants released pending trial in fiscal year 2001, the large majority (94 percent) appeared in court as required and were not rearrested. Only two (2) percent failed to appear for a court proceeding and two (2) percent each were revoked because they were (a) rearrested for a new felony charge or (b) rearrested for a new misdemeanor. The release of 12 percent of defendants was revoked for "technical" violations of their release conditions. In these cases, the pretrial services officer reported to the court violations of conditions such as home confinement, refraining from drug or alcohol use, and travel conditions.




This distribution of outcomes among closed cases is identical to that in fiscal year 2000.

## II. PROBATION

### A. Presentence Investigations

During fiscal year 2001, probation officers completed 60,987 presentence investigations for the courts, an increase of one (1) percent over the 60,331 reports prepared during fiscal year 2000.

### B. Supervision

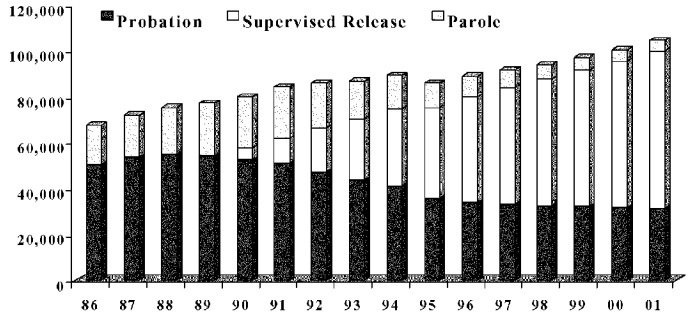
**Population Size and Composition**

Federal probation officers had a total of 146,844 offenders under supervision during the fiscal year. As of September 30, 2001, the population stood at 104,410, an increase of four percent over the end-of-year count in fiscal year 2000.

*Type of Supervision*

When compared to last year, the number of supervised releasees—offenders sentenced to a term of supervision to follow a determinate sentence to imprisonment—grew at a rate of seven percent. The parole population declined by 10 percent and the number of probationers remained steady.

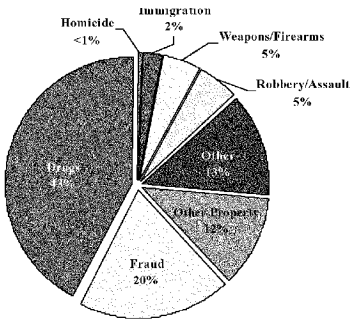
Of the offenders under supervision on the last day of the fiscal year, 66 percent were serving terms of supervised release, 30 percent were sentenced to probation, and 4 percent were on parole. Over the years, the proportion of offenders under supervision who had served time in prison increased from less than one-third in 1986 to almost two-thirds of the population in 2001.




This long-standing trend in the changing nature of the supervision population reflects a combination of full implementation of the Sentencing Reform Act (effective November 1, 1987) and legislation in the mid-1980s that established mandatory minimum prison terms for many drug offenses.[1]

[1] The Sentencing Reform Act (Pub. L. 95-536) created a guidelines-based determinate sentencing system, abolished parole, made probation a sentence in its own right, and created terms of supervised release that could be imposed to follow imprisonment.

*Nature of the Offense*

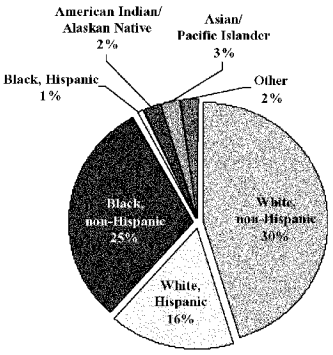


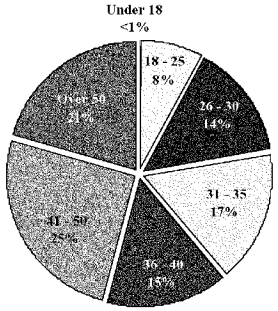

The distribution of offense types in fiscal year 2001 was essentially the same (within one percentage point) as that in 2000. The plurality of offenders committed drug offenses and just under one-third were convicted of fraud or other property crimes. Immigration comprises a significantly smaller proportion of the post-conviction population than the pretrial services population—2 versus 17 percent—because many immigration defendants are deported rather than released to post-conviction supervision.

*Demographics*

The demographic distribution of offenders under supervision on the last day of fiscal year 2000 is essentially the same (within one percentage point of) as last year's profile.

The offender supervision population is 79 percent male and 46 percent white. Hispanic offenders represent a considerably smaller proportion of this population than of pretrial defendants because they are more likely than non-Hispanics to be charged with immigration offenses and thus more likely to be deported than released to supervision.




Over 45 percent of the offenders under supervision—this year and last—are over the age of 40.

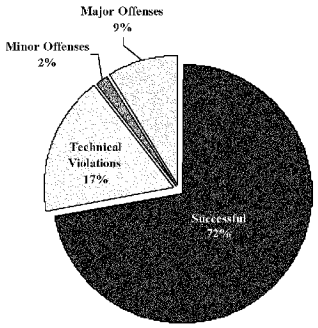
**Treatment Services**

*Substance Abuse:* This year, 31,365 offenders—21 percent of the supervision population—received substance abuse treatment from local providers under contract to federal probation offices. Over the last year, the substance abuse treatment population increased by six percent, which was slightly more than the four percent increase for the supervision population as a whole.

*Mental Health:* A total of 7,597 offenders—seven percent of the supervision population—received mental health contract services during the year. Although the mental health population is only one-quarter the size of the substance abuse population, its numbers are growing at a much faster pace, increasing 24 percent over fiscal year 2000 and more than doubling in the last 10 years.

**Supervision Outcomes**

In fiscal year 2001, 38,412 offenders were removed from supervision, up two percent from the number removed in fiscal year 2000. Of these, 72 percent successfully terminated supervision, 11 percent were removed from active supervision or revoked due to a new offense,[2] and 17 percent were removed or revoked for a "technical violation" of release conditions such as home confinement, refrain from use of drugs or alcohol, or participate in substance abuse or mental health treatment.




These percentages are identical to those for supervision cases that closed in fiscal year 2000.

[2] "Minor" offenses represent convictions for offenses for which the sentence is 90 days or less imprisonment, one year or less probation, or a fine. "Major" offenses are violations that include involvement in or conviction of serious offenses (including absconding from custody), arrest on another charge, or convicted and sentenced to more than 90 days imprisonment or more than one year probation.

## National Initiatives

Each of the achievements, activities, or events summarized below brought about system-wide changes and shaped the character of fiscal year 2001. Some are still evolving and can be expected to continue to make an impact in the future.

***Supervision of Defendants and Offenders***

Along with the responsibility to investigate defendants and offenders for the court, the system's responsibility to supervise these individuals when they are released to the community lies at the very core of probation and pretrial services work. Supervision has changed over the past decade or so—in the type of individuals under supervision, in the needs of persons reentering the community after a period of incarceration, in the demands supervision duties make of officers, and in the supervision tools and techniques available to officers. The system's on-going focus on supervision is a way to make sure that policy and practice in this crucial area continue to address the needs of both the court and the persons under supervision. The following are supervision accomplishments worth noting for fiscal year 2001:

- The Director of the Administrative Office of the United States Courts appointed a work group of chiefs, supervisors, and other experts from the courts to take on the challenging task of updating the system's supervision policy—both pretrial and post-conviction supervision. The group's goal is to develop a strategic plan to update and improve supervision policy and to revise the policy publications that guide the system's supervision work. Among the group's tasks will be to define what good supervision is, to clarify the roles of officers who perform supervision and of the managers who oversee supervision work, and to decide what supervision training the system needs. In fiscal year 2001, the group developed a model policy for managing offender noncompliance with conditions of release.

- A new national award was established to emphasize the system's role in providing community-based criminal justice solutions. The Make-A-Difference Award is designed to highlight how good supervision can bring about positive change in the lives of defendants and offenders. The award is given to an officer or a team of officers for work on a specific case. The defendant or offender under supervision must have presented moderate to significant difficulties at the start of supervision, shown a positive change in behavior during the course of supervision, and successfully completed the term of supervision. The award acknowledges the positive results officers achieve with careful planning, diligent monitoring, and appropriate use of interventions.

***Officer Safety and Integrity***

Two of the system's cornerstones—safety and integrity—received significant attention during fiscal year 2001. Officer safety has always been of paramount concern. The current focus on safety is to provide officers with the necessary tools—through improved officer safety training—to equip them to do their jobs well and stay safe in the process. The purpose in taking a look at officer integrity was to bring the system's requirements for officers more in line with those for officers in other federal law enforcement positions. Although the system has long had in place

some requirements (for instance, educational requirements, age restrictions, and pre-employment background investigations), the time was right to take a few additional steps to ensure that the officer workforce remains strong, reliable, and above approach. In that officers have access to sensitive information, carry firearms, and supervise persons charged with or convicted of serious crimes, such a move was prudent. The following initiatives have helped strengthened the two important areas of safety and integrity:

- To equip officers with the knowledge and skills that will help ensure their protection in any situation, the Director of the Administrative Office of the United States Courts appointed a work group of subject-matter experts from probation and pretrial services offices around the country to develop a comprehensive officer safety program. The group's mandate is to devise a national program that builds upon the safety training that districts currently provide. The goal is to give officers and officer assistants consistent training in such areas as threat awareness, threat identification, and threat management. In fiscal year 2001, the group developed the content for the program and pilot tested some of the training.

- To ensure that the system maintains the confidence of the courts, other agencies, and the public and that officers and officer assistants stay qualified and capable of doing their jobs, the system instituted a new program to require these employees to undergo background reinvestigations every five years. The reinvestigations are in addition to the initial investigations conducted pre-employment. The reinvestigations, which are conducted by the Office of Personnel Management, include personal interviews with the subjects, law enforcement and financial checks, and contacts with references.

- Underscoring the judiciary's commitment to maintain a drug-free workplace, a probation and pretrial services workplace drug testing program began operating in fiscal year 2001. The program, which requires that all officers and officer assistants be subject to drug testing for controlled substances, provides for both pre-employment and random testing. In fiscal year 2001, more than 700 tests were conducted, only one of which—a pre-employment test—showed a positive result.

- To ensure consistency in the weapons officers are carrying in the performance of their duties, the system began a transition to the semi-automatic pistol as the authorized firearm. These weapons are judiciary owned and issued. The firearm selected is the one currently preferred by most law enforcement agencies. Transition training began for officers who serve as firearms instructors for the system, with instructors from 32 districts completing training in fiscal year 2001.

***Strategic Assessment of the System***

A strategic assessment of the probation and pretrial services system progressed through the first of three phases in fiscal year 2001. The purpose of this study is to assess the future mission and needs of the system. The assessment, which is being conducted by an independent consultant, is part of a broader judiciary-wide initiative to study the effect on the judiciary of new responsibilities and organizational changes over the past several years. The assessment will consider all aspects of the system's operations—organizational, administrative, managerial, and programmatic—and identify what the system does well, what requires improvement, and what promotes or impedes the system's delivery of quality service. Roundtable discussions, site visits, and surveys are among the techniques the assessment team is using to gather the perspectives of

probation and pretrial services staff, district judges, magistrate judges, attorneys, and other stakeholders within and outside the judiciary.

***Technology***

Making useful information quickly and easily accessible to officers was the goal that spurred the development of a new data system introduced in fiscal year 2001. The system—Probation and Pretrial Services Automated Case Tracking System-Electronic Case Management ($PACTS^{ECM}$)—is a user-friendly case tracking and case management tool designed to help officers do their jobs more efficiently and effectively. Among the many features of $PACTS^{ECM}$ is the ability to electronically generate, store, and retrieve all investigation and supervision case information. It provides electronic imaging of defendants and offenders, their homes, vehicles, tattoos, and other useful images. $PACTS^{ECM}$ also interfaces with other databases officers use in their day-to-day work. Version 1 of the system successfully completed its independent test and was distributed to a "first wave" of 14 districts during fiscal year 2001.

***September 11, 2001***

The probation and pretrial services offices in the Southern District of New York at Manhattan, located just a few blocks from the World Trade Center, were shut down for days after the September 11 terrorist attacks. Colleagues from elsewhere in the district and from neighboring districts pitched in to keep operations going by providing office space and telephones, running background and record checks, and conducting other business. Critical incident stress management teams from probation offices in other districts hurried to New York City to provide support. In spite of enormous upheaval, officers in New York City stayed on the job and—with the help of laptops, cell phones, and personal digital assistants—continued to provide service to the court and to supervise defendants and offenders in the community. Also, chiefs across the country asked their officers to try to recall any open or closed cases that might yield information of use to the FBI in tracking down the terrorists or their accomplices. They reviewed the names on the FBI "watch list" to see if names matched. As a result, several districts were able to provide the FBI with potentially helpful information.

## United States Probation and Pretrial Services System At a Glance

### *Statutory Authority*

- The Federal Probation Act of 1925 (18 U.S.C. § 3651) gave the federal courts the power to place persons on probation under such terms and conditions as deemed best by the court.
- 18 U.S.C. § 3655 authorized probation officers to serve as parole officers and provide supervision to persons under the jurisdiction of the United States Parole Commission.
- The Pretrial Services Act of 1982 (18 U.S.C. § 3152) authorized implementation of pretrial services nationwide.
- The Sentencing Reform Act of 1984 (18 U.S.C. § 3583) established terms of supervised release to follow imprisonment sentences.

### *Who we are*

- Part of the federal judiciary, serving 94 federal judicial districts nationwide.
- A key player in the federal criminal justice process.
- 8,000 employees—officers and support employees—in 500 locations across the country.

### *How we are administered*

- Locally – Chief probation officers and chief pretrial services officers are responsible for administering the system and answer to the courts they serve.
- Nationally – The Administrative Office of the United States Courts, under the guidance of the Judicial Conference of the United States, oversees and supports the system. The Administrative Office's Office of Probation and Pretrial Services, with a staff of 40, provides this oversight and support.

## Types of Bonds Set for Defendants Released

| Fiscal Year* | Number of Cases Activated** | Number of Defendants Released*** | Number of Defendants Released on Bond (of the # in the previous column) | Personal Recognizance | Unsecured Bond | Cash Bond | Collateral | Corporate Surety | No bond Set |
|---|---|---|---|---|---|---|---|---|---|
| 1999 | 80,154 | 20,427 | 19,998 | 4,786 | 10,781 | 1,787 | 1,413 | 1,231 | 429 |
| 2000 | 87,513 | 22,148 | 21,848 | 5,284 | 11,546 | 1,982 | 1,588 | 1,448 | 300 |
| 2001 | 88,049 | 21,827 | 21,562 | 5,366 | 11,262 | 1,943 | 1,480 | 1,511 | 265 |

* For the 12-month period ending September 30.

** Includes pretrial diversion cases.

*** Includes only defendants released at the initial detention or review hearing.

Source: Administrative Office of the U.S. Courts

Mr. SMITH. Mr. Verrochi?

**STATEMENT OF RICHARD VERROCHI, PRESIDENT, PROFESSIONAL BAIL AGENTS OF THE UNITED STATES**

Mr. VERROCHI. Thank you, Mr. Chairman. My name is Richard Verrochi. I am a licensed professional bail bondsman in the States of New Hampshire and Vermont and I am President of the Professional Bail Agents of the United States, which is the national professional association of bail bondsmen, representing about 14,000 licensed agents in this country.

The historic use of bail in the United States is to guarantee the appearance of a defendant in court. A bail bond is forfeited by a court when or if a defendant fails to appear. In essence, we can label a bail bond as a guarantee of appearance, not of performance.

The Vacarro decision in 1995 changed the Federal courts' interpretation of what a bail bond is. In essence, the traditional guarantee of appearance was changed to include a guarantee of the personal good conduct of the defendant who was out on bail. Since the Vacarro opinion, bail agents and corporate surety bond issuers have really been unable to write bonds in the Federal system due to the fact of the excess risk. We cannot quantify the risk.

I, as a bail bondsman, can quantify my risk of appearance or non-appearance, but when it comes to whether a defendant is going to violate a condition such as non-use of alcohol, drugs, or not getting arrested again, there is no way that I can control that.

The important thing about the Vacarro decision is that Mr. Vacarro appeared at every single one of his court hearings and the Vacarro decision has made bail forfeiture an issue when a defendant always appears. So the point that I would like to make and point out to you is that H.R. 2929 is very narrowly based. It says only that bail in the Federal court will be forfeited on non-appearance only. That is the historic basis for bail.

A Federal court can also require all kinds of conditions for a defendant when they are out on bail. That could be home monitoring, it could be random urinalysis, that sort of thing. Those are conditions of bail that are levied directly on the individual defendant. The defendant is responsible for his behavior, not a surety who is guaranteeing his performance.

The real issue comes down to when a surety is a family member, be it a set of parents or grandparents who have put up cash or real estate as the surety, as the guarantee for the appearance of a defendant. Do these people understand that they are also liable for the defendant's conduct, that they are required to make sure that he abides by conditions, additional conditions, when, in fact, most of them believe that they are only responsible for his appearance?

The Bail Bond Fairness Act would restore appearance as the sole basis for forfeiture in a bail bond in a Federal court. The bill would not hinder, it would not impede, it would not restrain a Federal court from levying other types of conditions. But if a defendant violates those other types of conditions, then the court can add more conditions or the court can revoke the bail, which is the personal penalty that the defendant will pay, and a surety, on the other hand, will just guarantee that the defendant appears in court, the traditional role of a surety in the United States.

I ask that you support H.R. 2929 because it will allow bail agents and individuals to once again take up their traditional role of guaranteeing appearance without threatening bail agents or individual families with catastrophic loss because a defendant somehow violates a condition that a court has set down. I believe that a violation of conditions is something that the defendant should pay for and that a non-appearance is something that a surety should pay for.

So, Mr. Chairman and Members of the Committee, I appreciate your time. I ask that you support H.R. 2929, the Bail Bond Fairness Act, so that I, as a professional bail bondsman, can once again serve the Federal court system in the traditional way of the past. Thank you.

Mr. SMITH. Thank you, Mr. Verrochi.

[The prepared statement of Mr. Verrochi follows:]

PREPARED STATEMENT OF RICHARD VERROCHI

Good Afternoon, Chairman Smith, Members of the Committee. On behalf of the Professional Bail Agents of the United States I wish to thank you for inviting us to appear before the Subcommittee today to discuss H.R. 2929, the "Bail Bond Fairness Act of 2001." My name is Richard Verrochi and I am a Licensed Bail Agent in New Hampshire and in Vermont. I am the elected President of the Professional Bail Agents of the United States. PBUS is the national professional association of the nation's 14,000 bail agents.

The historic use of bail in the United States is to guarantee the appearance of a defendant for all of his court hearings. A bail bond is forfeited by a court if the defendant fails to appear as ordered. In essence, we can label a bail bond as a guarantee of appearance.

H.R. 2929 seeks to remedy the result of the Ninth Circuit's 1995 opinion in *United States* v. *Vaccaro* (51 F. 3d 189) which allowed the court to forfeit the $100,000 corporate surety appearance bond posted by a bail agent (even though the defendant never missed a court date) because Vaccaro had violated his *personal* conditions of pretrial release by traveling outside of the jurisdiction and committing a new offense.

In *Vaccaro*, a federal district court held that the separate order specifying the conditions of the defendant's release was incorporated into the corporate surety appearance bond posted by the bail agent. In that case, at the bottom of the bail bond face sheet supplied by the government were the words, "see also, the order specifying methods and conditions of release attached hereto and made a part hereof." Thus, the court determined that the two documents should be read together, and actually constitutes one complete order. Then, using Rule 46(e), the court determined that a condition had been violated and that the entire bond should be forfeited. It is important to note that the *Vaccaro* court also added that Congress could have chosen to amend or alter Rule 46(e), and its failure to make such a change "is an indication of the continued viability of the 46(e) forfeiture sanction."

It is important to make the distinction that the traditional guarantee of appearance was changed by the Vaccaro decision to the extent that a bail bond came to guarantee both appearance and adherence of the defendant to the conditions of bail set by the court. Even though a defendant appeared for all of his court dates, bail could be forfeited for violation of conditions through the use of drugs or alcohol, rearrest, etc.

Since the *Vaccaro* opinion, bail agents and corporate surety bail bond issuers have essentially been eliminated from the federal pretrial release system, for obvious excessive risk reasons. Federal defendants are therefore faced with reduced means of pretrial release, and the federal system is deprived of a vehicle which returns an errant defendant to the court at no cost to the public sector. When commenting on this issue in 1998 before the House Crime Subcommittee, Congressman Bill McCollum noted that there were some 7,000 warrants outstanding for federal defendants' failure to appear in court. I can assure you that few, if any, of those 7,000 fugitives was released pretrial on an appearance bond issued by a professional bail agent.

A conditions or performance based bail bond (guaranteeing both appearance and personal conduct) is particularly hard on individuals and families who post bail directly with a federal court. In these cases, families, be it parents or grandparents,

run the risk of loosing their life savings or homes simply because a defendant has failed a urine test or traveled outside a geographically defined area. Even if the defendant appears at every single one of his court hearings, the family can loose their cash or their property because a random urine test came back positive. This is inherently unfair to people who believe that they are merely guaranteeing that their son or grandson will appear in the federal court.

In state court systems, bail bonds are appearance bonds. If a defendant fails to appear the bond is forfeited and the bail bond agent must either produce the defendant or pay the forfeiture to the court. This is considered as a defined risk. I know that the bail bond executed by me will only be forfeited in a state court if the defendant fails to appear. Therefore, the underwriting of a bail bond for a defendant in state court is based on the likelihood of a defendant to appear in court. Once the bail agent has assessed that risk, he or she can take whatever additional steps are necessary to assure the defendant appears in court. For example, the family or an indemnitor may be asked to co-sign on the bail bond or place collateral with the bail agent.

In the United States, bail agents post approximately 2.5 million bail bonds each year, guaranteeing the appearance of defendants in court. Imagine how difficult it is to underwrite a bail bond for a defendant detained in the Federal Court system when the risk is not solely appearance? How can a bail agent or the insurance company guarantee the behavior of a defendant released on bond? How can a mother or grandmother guarantee the behavior of her son or grandson released on bond?

A federal court can require a defendant released on bail to adhere to a curfew, random urine testing, take an educational program, remain employed full-time, and much more. None of these conditions has anything to do with the most basic aspect of a bail bond which is the *appearance* of the defendant in court on his or her appointed day. The Vaccaro decision has transformed the traditional *appearance* bond into a *performance* bond, a wholly unfair and improper transition.

Historically, a bail bond guarantees appearance. When the bond is breached, a surety cures that breach by producing the defendant in court. If a bail bond is defined as a performance bond and a defendant violates a condition of the bond, by failing a urine test, there is no way that a surety can cure this type of breach. A surety must be given the opportunity to cure a breach. This can only be done by defining a bail bond as an appearance bond.

The "Bail Bond Fairness Act of 2001" does not interfere with a court's ability to directly penalize a defendant who has violated his conditions of release. A defendant who fails to report to pretrial services or who fails urine screening, or who temporarily leaves the jurisdiction without court permission, may still be subject to more stringent conditions—even revocation—of bail. He may be remanded to custody. But if he is not remanded to custody, and if he shows up for trial on time, his bail will not be forfeited.

The increased "fairness" which the "Bail Bond Fairness Act of 2001" proposes is neither fairness to the defendant nor fairness to the prosecution, but fairness to the surety. The surety who produces his principal for trial in a timely manner has fulfilled his obligation to the courts and is entitled to discharge of his obligation under the bond. He need not be penalized because, while released on bail, the defendant ran a traffic light, went across a jurisdictional line for the weekend, or quit his job. The consequences of these acts of misconduct will remain where they belong—with the defendant.

Passage of HR 2929 will allow for the release of defendants to be supervised by professional bail agents who can appropriately guarantee to the court that the defendant will appear. Sureties—particularly corporate sureties—will be willing to accept the risk of a given defendant's nonappearance in circumstances in which they would not accept the risk of the same defendant's violation of performance conditions. It is in society's interest to see that arrestees who have been admitted to bail are released from custody on the terms to which they have been admitted.

The "Bail Bond Fairness Act of 2001" would restore appearance as the sole reason for forfeiture of a bail bond in Federal Court. This bill *would not* impede, hinder, constrain or interfere with the court's ability to penalize defendants who have personally violated conditions of bail. This *would* enable bail agents to write more Federal bonds which would assist the Federal court system in supervising defendants, reduce the pretrial detention populations, and result in the return of non-appearing defendants to custody in an efficient fashion. Thank you for your consideration of H.R. 2929.

Mr. SMITH. I just want to point out before we go to questions that we have been joined by the gentleman from North Carolina, Mr. Coble. We appreciate, as always, his attendance, too.

Mr. COBLE. Thank you.

Mr. SMITH. If you have a quick opening statement, we can certainly do that, or are you ready for us to go to questions?

Mr. COBLE. I will do you the good favor and decline my opening statement.

Mr. SMITH. Great. Thank you, Mr. Coble.

Mr. Verrochi, is this a fair statement of your position, that you feel that as in State courts, so in Federal courts, that there should only be appearance bonds, not performance bonds, for the reason that the physical appearance of someone is the only condition over which the bail bondsmen have actual control? They don't have any control over the other conditions that might be imposed and, therefore, they shouldn't be held responsible for the actions of the defendant and conditions other than the physical appearance?

Mr. VERROCHI. That is correct, sir. In a State court, it is an appearance bond, and in the States of New Hampshire and Vermont, where I operate, I can cure a forfeiture of my bond. In the event that a defendant fails to appear, I can locate him and surrender him back to the court and cure the forfeiture.

Mr. SMITH. Right.

Mr. VERROCHI. In the case of a violation of conditions, such as drug use or violation of curfew, that sort of thing, I can't cure that. There is no way that I can cure that. So when the forfeiture is made, I am out.

Mr. SMITH. And Judge Carnes, why should we hold bail bondsmen responsible for conditions over which they have no control?

Judge CARNES. Well, if they don't have any control over the conditions, rule 46(e) itself provides the remedy. Rule 46(e)(2) says the court may direct that a forfeiture be set aside in whole or in part if it otherwise appears that justice does not require the forfeiture.

Mr. SMITH. But in point of fact, as rules are enforced today, if a bail bondsman is responsible for the defendant not breaking any other laws and, in fact, they take drugs or they violate some other law, then the bond is forfeited, is it not?

Judge CARNES. The bond is forfeited, but then the judge has the power and authority and is directed to do so.

Mr. SMITH. But that is seldom exercised, as I understand it. It is discretionary, is it not?

Judge CARNES. I don't know that it is seldom exercised or I don't know that it is frequently exercised. I am not——

Mr. SMITH. It is my understanding that it is not frequently exercised and, therefore, the real impact is that they are being held responsible for the violation of laws or for other conditions over which they have no control.

Judge CARNES. I don't see why that wouldn't be an abuse of discretion under 46(e)(2) or 46(e)(4), which says you can set it aside in whole or part. Oftentimes, a bail bond agent in State court will bring somebody in months after he was due to appear and have the forfeiture set aside, even though there was an actual breach of the condition, because he says, I couldn't help it. I did the best I could.

Mr. SMITH. There are a lot of judges that probably would be held in violation if that standard was enforced as you have just suggested. Maybe that is the case and maybe that is part of the solu-

tion, but I am not sure that is a realistic solution, is to go after all these judges for abuse of discretion, to tell you the truth.

Judge CARNES. Well, you don't have to go after them. All you have to do is appeal. If we have to assume that the laws aren't going to be enforced, then I don't think much of anything that we decide is going to make any difference.

Mr. SMITH. Why should we have a different standard for Federal court as opposed to State courts?

Judge CARNES. Well, why should the Federal standard be modified to the standard that may exist in some, but not all, of the States?

Mr. SMITH. Do you think the same standard ought to be applied in the State courts? Is that your position?

Judge CARNES. No. The Judicial Conference of the United States takes the position, this is the standard that ought to apply in Federal courts and it is up to the States to decide what standards should apply in their courts.

Mr. SMITH. Right, but you just said, in response to my question, you said, why not apply the same standard to State courts? You are not promoting that, I gather?

Judge CARNES. Oh, no. No. If I said that, I——

Mr. SMITH. Then let me go back to my question. It seems to me that we ought to probably have the same standard, and to me, it is common sense that you ought not hold the bail bondsman responsible for conditions over which they have no control. Now, you are saying that the judge has discretion. My response is, the judges don't exercise that discretion very often and, therefore, it is the bail bondsmen that end up paying the price, and that is one reason why you see in Federal court, for example, very few of the bonds posted of the kind that I think you and I would support.

Judge CARNES. Excuse me.

Mr. SMITH. That is a statement, not a question. Let me think what else I can squeeze in here in the remaining seconds.

I think, just to make the point that there needs to be a better solution than relying upon the discretion of judges, which is not exercised very often. Otherwise, I think justice is not necessarily served when individuals either can't post bond that they ought to be able to post or where individual bail bondsmen are held responsible for actions over which they have no control. I am not sure that either situation is the best situation and that is what we seem to have today.

Judge CARNES. But you realize the remedy proposed in this legislation is that even the defendant himself wouldn't be held responsible, even when he posts the collateral, even when it is his property at stake, even when he joins, he couldn't be——

Mr. SMITH. Right.

Judge CARNES. In other words, Mr. Vacarro and Mr. Gigante would have had their way.

Mr. SMITH. Mr. Verrochi, do you want to respond to that, because my point has to do with the bail bondsman, not the defendant.

Mr. VERROCHI. Mr. Chairman, I have always been asked the question, is bail a penalty or is it merely an incentive, a financial guarantee or some other type of guarantee? I do not believe that

bail should be treated as a penalty in any way. Bail is a guarantee of appearance. That is it, bottom line.

Mr. SMITH. Thank you, Mr. Verrochi.

The gentleman from Virginia, Mr. Scott, is recognized for his questions.

Mr. SCOTT. Thank you, Mr. Chairman. I want to thank both witnesses.

Judge Carnes, you have indicated, I think, with the chart that it is not thousands, it is just a couple of percent. After somebody fails to show in the two-point-something percent, how many of them are eventually caught?

Judge CARNES. I don't have those figures, Mr. Scott.

Mr. SCOTT. In how many cases in granting bail is the bond responsible for conduct, that conduct is an element of the bond?

Judge CARNES. I don't have those figures. I don't know if they exist or not. Perhaps the Administrative Office——

Mr. SCOTT. Is it normal or unusual?

Judge CARNES. The best I can tell you is that according to a survey that a magistrate judge on the Committee conducted, the majority of districts don't impose conditions other than appearance. That is the majority of 94 Federal districts. But some do. For example, I understand, I have been told that there are districts in New York that do, in California that do, in Louisiana that do. Whether that is subject to or caused by any local conditions, I don't know.

Mr. SCOTT. Does the Judicial Conference have a problem with checkerboard standards?

Judge CARNES. No. The Judicial Conference has not taken a position on whether there should be a uniform practice or policy, and the rule itself——

Mr. SCOTT. Wait a minute, on this or generally?

Judge CARNES. I would have to answer specifically on point-by-point questions.

Mr. SCOTT. In those areas that do have conduct as a condition, how many bonds are forfeited as a result of bad conduct?

Judge CARNES. The best answer I can give you on that is to amalgamate two sets of data. Page five of the report that was attached or submitted along with my statement has pretrial release outcomes. Now remember, this doesn't break it down on bonded and non-bonded. If you look at that data, 2 percent were revoked, pretrial release was revoked because of felony charges, 2 percent because of other charges, a combined total of 4 percent for failing to obey other laws, and then 12 percent for other technicals, which I understand to be other conditions, such as not reporting to your probation officer or not reporting for a urinalysis.

Now, if you take that 16 percent and if you assume that the same statistics for defendants released apply to those violations, then you can try to run the figures across from that. For example, 75 percent of the defendants who were released are released on some type of bond, even if it be an unsecured bond or a corporate surety or personal collateral. So if you multiply the 16 percent times the 75 percent and back against that number, you will get an approximate estimate, but I would urge you to understand that is only an estimate. That is the best I can do.

Mr. SCOTT. One of the things that kind of confuses me is that this chart, in your two-point-something percent failing to show up—well, FTA, failure to show up, is 2 percent, and other problems counts to the other 18 percent. If the person is in court and you can forfeit their bond, which is essentially assessing a fine, since they are sitting right up in your face, why can't you just fine them or jail them for the misconduct?

Judge CARNES. If you wanted to charge them, arraign them, try them for criminal contempt, you could do that, but it would require a separate trial unto itself. The procedures for forfeiture of a bond have the attraction, the systemic attraction they do because they are summary procedures, and for that reason, a lot of judges are more likely to release people because they know they have effective deterrent. If the only deterrent or the only sanction they could impose was to institute a separate trial for contempt, there would not be many folks released on bonds.

Mr. SCOTT. You suggest that that is an attraction. Some of us might think of that as a problem, that you are fining somebody without the requisite due process. I mean, you can revoke the release. If they have messed up, they can come back in and say, you have messed up. I am going to revoke or terminate the bond, send you to jail, and Mr. Verrochi doesn't lose anything because he has appeared, and the guy is sitting up in jail for the rest of the trial.

Judge CARNES. The same due process protections apply to the revocation of release that apply to the revocation of the bond, of the forfeiture of the bond. You have got to give the same notice, same opportunity to be heard, and hear the same evidence on the record.

Mr. SCOTT. But you have got this presumably innocent party who is the one suffering, because the chance is that somebody is going to jail under these conditions.

Mr. Verrochi, do you ever get in there and get your money back from the defendant when he gets his bond revoked? How often do people actually pay you back?

Mr. VERROCHI. Usually, Mr. Scott, we have an indemnitor, a family member or something like that, particularly on large bonds. Say a $100,000 bond, we would have a mortgage on someone's home. Very rarely is it the defendant. It is usually parents, grandparents, employers, that sort of thing. So when you use the term "innocent party," well, we as sureties are a third party, but we also have another third party, an indemnitor or a family member, that sort of thing, and we go back on them and attempt to collect our money from them.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Scott.

The gentleman from North Carolina, Mr. Coble, is recognized for his questions.

Mr. COBLE. Thank you, Mr. Chairman. It is good to have you all with us. Mr. Chairman, I apologize for my delayed arrival. I had another meeting.

Judge Carnes, do you have statistics on the number of bonds forfeited in Federal court versus the number of bonds forfeited in State courts?

Judge CARNES. No, Mr. Coble. I have no idea how many bonds are forfeited in State court and I am not sure anyone does, to tell you the truth.

Mr. COBLE. That is just a quirk that interests me, if you did know.

Judge CARNES. The problem is, you have 50 different jurisdictions keeping 50 different sets of records with different degrees of uniformity, so——

Mr. COBLE. You are right. I doubt that that can be compiled, not easily, anyway.

Mr. Verrochi, the question comes to me as to how bail agents protect themselves against losses. If collateral is usually required, one would conclude that the person providing the collateral has an interest in assuring that the defendant not violate his conditions of release. Does that work as I have just portrayed it?

Mr. VERROCHI. Yes, sir, it does, and I usually use the phrase, I try to put financial handcuffs on a defendant. I try to involve family members or close friends, that sort of thing, who will be liable in the event that a defendant fails to appear and we are not able to apprehend them.

In most instances, though, I am not fully covered by the collateral. I almost always have some risk and some exposure, so I do suffer a loss even though I have been able to collect something from an indemnitor.

Mr. COBLE. I guess I could put this question, Mr. Chairman, to each of the witnesses. If the Congress were to enact this legislation, gentlemen, what recourse would Federal judges have if a defendant failed to meet the conditions of bond?

Judge CARNES. The same recourse they have now minus one, which would be you can revoke the release—you can add additional conditions of release, more restrictive. For example, if the defendant violates the curfew, the judge could order him under house arrest with electronic monitoring, that sort of thing, and that often happens. It is not always that a violation of a condition other than appearance results in revocation. And also, technically, although it almost never happens, you could cite them for contempt because the conditions are an order that is imposed, but that is such an onerous procedure that it is almost never resorted to.

Mr. VERROCHI. I agree with Judge Carnes, and in State courts, at least in the States that I operate in, it is quite common to either add some very significant, much more stringent conditions to a bail if there has been a violation, or to reincarcerate the defendant, and the defendant in that situation is paying his penalty by being reincarcerated with no bail because he has violated the conditions, and that is what we believe is the appropriate penalty, that the defendant be reincarcerated.

Mr. COBLE. I thank you, gentlemen. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Coble.

The gentlewoman from Texas, Ms. Jackson Lee, is recognized for her questions.

Ms. JACKSON LEE. I thank the Chairman and I thank the Ranking Member and the witnesses that appeared before us this afternoon.

Let me, Judge Carnes, begin with you and maybe we can work through this legislative initiative. I see clearly that the Judicial Conference is against H.R. 2929 and the opening page suggests that it would impair the authority of the Federal courts to enforce conditions of release prior to trial. What would we have to do to this legislation to make it palatable to the Conference and to the court?

Judge CARNES. Other than scrap it entirely? [Laughter.]

I am here as a representative of the Judicial Conference, and what the Conference—it is a rather involved and deliberate process and the position the Conference has taken is just the position that you have stated, which is opposes any legislation that would hamper the ability of judges to forfeit bonds for violation of conditions and limit it to just non-appearance conditions.

Ms. JACKSON LEE. Let me share this thought with you, because I am inclined to always seek to be supportive of the Federal judiciary in terms of helping them do their job better or helping them do their job. I think my colleagues have highlighted a point that I think is extremely important, in that the initial premises of a bond was, one, public safety, and two, appearance. We have since become more creative, more colorful, and certainly, in certain circumstances because of the particular crime alleged, it may be pertinent.

But I give you an example on a State level, where the court imposed, for example, a citizen who had been active in civic affairs, who still had the respect of his community, however, of course, he is now under the criminal system for a particular reason and is now looking to be a judge. I think in this instance, the gentleman had been on probation circumstances but still was under a bond and a requirement by the court. But the court required that individual not to participate in civic activities.

I am only giving this as a potential added feature that judges may render that would seem to be a hardship to revoke. In this instance, you would be revoking the individual's probation, but I just want to use it as a comparison, say to revoke the person's bond if you wanted them to go to a certain church and they decided to go to another church. It is not a question of appearance or safety but it is a question of the judge's discretion on designing the basis of being released in the instance in the Federal courts. It may be something that is done in agreement with the prosecution, but it has nothing to do with keeping the community safe. It has nothing to do with ultimately discerning or deciding whether or not this individual will appear.

Is there any way the courts could see that you are even giving yourselves an extra burden if you want to then forfeit a bond on the basis of some action versus the basis of actual appearance which contributes to the safety of the community?

Judge CARNES. I don't know what the laws are and the rules in various States, but the premises of the conditions in Federal court are that they are either necessary to assure the appearance or necessary to assure the safety of others and of the community, and all of these conditions that we talk about and are mentioned are that. I can't imagine it being necessary for the safety of the community in any meaningful sense that somebody not participate in civic re-

sponsibilities or go to one church over the other, although in Alabama, we have had some pretty raucous occasions in a couple of churches. [Laughter.]

Ms. JACKSON LEE. I thought if I gave that colorful example, I would get a colorful response. [Laughter.]

Let me ask Mr. Verrochi, then, to respond to the Judge's comments that all the requirements of the Federal courts have to do with either appearance or public safety. I happen to believe that there is some flexibility there. How would you respond to that? Is that accurate, or do you believe that there are some onerous burdens that causes the bond to be forfeited and has nothing to do with public safety and appearance?

Mr. VERROCHI. I will respect the Judge's comments. I do believe in most instances that the courts set behavior-type or behavior conduct-type decisions—no drinking, no drugs, a curfew, you must have a job, those types of things. But the issue, again, is that bail should not be a penalty. Bail is an incentive to appear, and typically, it is a third person putting up the bail. In, I would easily guess, 95 percent of the cases, it is that third person who will suffer, not the defendant, if bail is forfeited for violation of conditions.

Mr. SMITH. Thank you, Ms. Jackson Lee.

The sponsor of the legislation, Mr. Barr from Georgia, is recognized for his questions.

Mr. BARR. Thank you, Mr. Chairman.

The conditions that you just cited, Mr. Verrochi, I don't think any of us—certainly, I would not disagree with. Those are legitimate and ought to remain completely within the discretion of the court. If they believe that the safety of the public requires that the person, the defendant, as it were, the person charged with the crime not engage in certain behavior that would pose a danger to society, I think it is entirely appropriate, and I am not interested in limiting in any way the court's discretion in imposing those conditions, and if the conditions are violated, revoking the bond.

I do have a problem, and this goes to the heart of the legislation, with making the bail bond agent responsible for that. I don't understand, Judge, why you want to make the person, the company who is trying to do their best to assist the court in its decision—the bail bondsman doesn't make the decision whether or not the person should get bond. The judge does. They are providing a service to the court to facilitate that, to basically enable the individual that you and your fellow jurists have made, that this person is worthy of being allowed to remain in the community or at least a part of the community during the pendency of the action.

What is the philosophical basis for seeking to penalize the company for the defendant's failure to live up to those very appropriate and very necessary conditions? You can penalize the defendant, and you certainly ought to, if, in fact, they violate them. Revoke their bond. But what is to be gained by penalizing the company and, therefore, at least in the view of the testimony of the bail bond industry, drying up, to one extent, and we can argue over the extent to which it has limited the availability of bail bonding, why would you want to penalize the company and dry up whatever pool it is, however many individuals out there do make it possible for these bonds to be met?

Judge CARNES. Let me say, as a predicate to answering your question, that this legislation doesn't do what you say we ought to do, which is revoke the defendant's bond. Even when the defendant is the only person on his bond, even when the defendant puts up property or cash and the defendant misbehaves, violates very serious and important conditions—let us say the defendant was told you can't possess a firearm, you can't go near the victim or a witness. That is a condition of release and of this bond, and if you do, we are going to forfeit your bond and you are going to lose your house. Stay away from them.

Under H.R. 2929, the defendant takes a rifle and goes after the victim and you can't forfeit the bond.

Mr. BARR. You can put him in jail.

Judge CARNES. You can put him in jail, but you can't forfeit the bond.

Mr. BARR. But if the purpose of setting those types of conditions, as opposed to appearance, is to protect society, isn't that really the remedy that you would want anyway, to get him or her off the street and get them into jail?

Judge CARNES. If I were the victim or the witness being protected, I would want as much protection as possible. In addition to the threat of release being revoked, I would want to have the defendant, like Mr. Gigante, threatened with the loss of his children's home if he bothered me. I would want to err on the side of the victim as opposed to on the side of the defendant or those who may be with the defendant and in a position to influence him.

We talk about innocent family members, but so often, you have a crime family in the literal sense of the word. I have seen cases——

Mr. BARR. I have not used that term, and I understand the example you are citing as a very appropriate one and a very egregious one. I suspect that it is somewhat not reflective of the broad range of cases that we are talking about here. But when you have an individual like Mr. Vacarro or Mr. Gigante or whoever, that pose a danger to society, first of all, I would assume that the most important remedy would be get them off the street, revoke their release, get them back in custody.

Would this legislation, then, be acceptable if it were limited so that we are talking about an outside bail bond agent, not a member of the family or the defendant themselves, so that the court would still retain the ability not only to go after the individual, get them back into custody, which this legislation does not in any way limit the court's ability to do that, but limits the scope of the Vacarro decision, so to speak, so that it does not penalize the third party bail bond agent?

Judge CARNES. Well, that would certainly be a more narrow and moderate approach, a more problem, perceived problem specific approach, and it would probably be subject to less criticism. But I repeat, I am here on a mandate to represent the Judicial Conference's position and they haven't been presented with, what about this, what about that. What they were presented with was, should we support the restriction of judges, restriction on the ability and authority of judges to revoke bonds for non-appearance con-

ditions, and their response to that was, no, we shouldn't support that legislation. We think it is a bad idea.

Mr. BARR. Could I ask one additional question, Mr. Chairman?

Mr. SMITH. The gentleman, without objection, is recognized for an additional 2 minutes, 3 minutes.

Mr. BARR. Thank you. Three?

Mr. SMITH. Three it is. [Laughter.]

Mr. BARR. Mr. Verrochi, if the legislation were modified along the lines that we were just discussing with the Judge, would that, in the view of your industry or profession, still address the main crux of the problem?

Mr. VERROCHI. It would address the problem as far as a professional surety is concerned, like myself. However, I do believe that, in all fairness, setting aside Mr. Vacarro and Mr. Gigante, if that is the correct name, setting aside those two gentlemen, when Grandma and Grandpa put up their life savings or their house, when Mom and Dad are out there putting up all that they have to get a defendant out of jail, is it fair—you know, here I am. I would certainly be willing to accept a compromise that protects my profession and my industry. But when I speak of justice, where is the justice when family members, innocent family members are left forfeiting a lot of money or their home?

Mr. BARR. What if the maximum legislation that we could get through would be if we could get through legislation that would limit the relief provided in H.R. 2929 to outside parties that provide the surety, whether it is——

Mr. VERROCHI. Professional sureties, yes.

Mr. BARR [continuing]. Or a family, say, because personally, I have no problem at all in making the individual, himself or herself, if they violate a condition of the bond and it is their property and they have put it up or their resources, revoking it, because to me, that is something within their control. But an outside party, would the industry or the profession have any problem with saying that if it is a condition on John Doe and John Doe has put up this security for his bail, that it would be appropriate to revoke it as a condition?

Mr. VERROCHI. Sir, I think that if that is the halfway measure, of course, I would—I believe that third parties, be they family members or professional sureties, should be allowed not to have their bail forfeited. However, I would like to reiterate the point that I believe in our legal system, bail has always been treated not as a penalty. Bail has been treated as a guarantee of appearance.

I am not trying to defend a defendant who is violating his conditions. I truly am not. Nor am I trying to limit the power of a judge to set conditions. I am merely trying to say that bail, the traditional bail that we have in this country, is a guarantee of appearance. If someone violates their conditions, put tighter conditions on them, fine them, find them in contempt, or put them back in jail. That is the appropriate——

Mr. BARR. And I agree, and certainly that is the intent of the legislation. I was just trying to explore whether there might be, as we look down the road to the possibility at some point of enacting this legislation, whether there is room to maneuver——

Mr. VERROCHI. The simple answer is, yes, sir, there is.

Mr. BARR [continuing]. To compromise, and I appreciate your position, Judge. You are not taking a position on that today. I do not want to certainly put words in your mouth. If there is one person one should never put words in the mouth of, it is a judge. [Laughter.]

But maybe down the road we could propose some different language and explore the possibility, because I am sensitive to what the profession is saying, that this is a problem. I certainly understand the necessary discretion and power that the courts need to maintain, as well, and maybe there is a compromise that we could work out and explore that down the road. Thank you.

Mr. SMITH. Thank you, Mr. Barr.

Before I recognize Mr. Scott for additional questions, I just want to recognize the gentleman from Virginia, Mr. Goodlatte, and appreciate his attendance here, as well.

Mr. GOODLATTE. I actually do have a question, Mr. Chairman.

Mr. SMITH. In that case, the gentleman from Virginia, Mr. Goodlatte, is recognized for questions.

Mr. GOODLATTE. Just two quick questions. I noticed in the summary of the legislation that there was a statement made that thousands of Federal prisoners are not appearing in court, and I am wondering why they—it would seem to me that if there was a hard time getting bond, that they would be in jail and, therefore, definitely appearing in court. I am wondering how that arises that they don't show up in court because they can't get bond posted for them.

Judge CARNES. Our position, and the statistics we have that the AO keeps on that are very precise, is that there simply are not thousands of Federal defendants who don't appear. The no-shows has ranged for the last 10 years from 2.3 percent to, I think, 2.8 percent, which is about as close to perfection as you ever get when you are dealing with individuals charged with crime who are released and have an incentive not to show up. I mean, that is a very enviable rate I think any of the States would welcome.

Mr. GOODLATTE. Is there any evidence that judges are not requiring that bond be posted, simply releasing individuals on their own recognizance as a result of this difficulty in getting bond posted?

Judge CARNES. Well, actually, the Bail Reform Act encourages release on recognizance and limits the number of times when you can require anything to where it is required to assure appearance or for public safety. All this has changed. In 1966, Congress passed the Bail Reform Act, a huge push, release more people, do away with corporate sureties. We don't like the fact that wealthy people get out and poor people don't. Have more people released on their own recognizance. Have more people released on the premium that they would pay corporate sureties.

And then what happened was too many people were being released and they were committing a lot of crimes. So in the 1984 Act, that got tightened up a good bit. So we are now in the position in which, at least in some districts, conditions short of appearance are used effectively as a condition of bond, and that is how we got to where we are today, trying to serve the dual aims of Congress not to discriminate against folks who didn't have money, but also

to make sure that we minimize the number of crimes they committed while they are out.

Mr. GOODLATTE. Mr. Verrochi, do you have any comment on that question?

Mr. VERROCHI. No, sir, I don't. The Judge has his statistics. I can only cite our experiences in State courts. We write about 2.5 million commercial bail bonds each year.

Mr. GOODLATTE. How many are written in Federal court?

Mr. VERROCHI. Very, very few. In my 10 years as a bail bondsman, I have written one. It is—at this point, the surety companies who bond me say that I cannot write a bond in Federal court because of the conditions, the performance bond which the court is requiring.

Mr. GOODLATTE. Let me ask either one of you, is there a way to split this in such a way that if the bond is posted or guaranteed by an independent entity, like a bail bondsman, it would get a different treatment than if the bond were posted by the defendant him or herself? So in other words, the behavioral conditions imposed in the release could be applied to the bond if it were the individual's own money but not to your money?

Mr. VERROCHI. That is the question that Mr. Barr, I believe, was asking me, and, of course, our industry, our profession would accept that because it takes the onus of the performance aspect off of us and puts it solely on the defendant.

However, again, I will say it one more time, I believe that bail is a guarantee of appearance. It should not be used as a penalty. Unreasonable levels of bail, financially speaking, are not appropriate.

Mr. GOODLATTE. Let me give Judge Carnes an opportunity to respond, as well, since my time has about run out.

Judge CARNES. I think, without stating the Judicial Conference's position on whether that would be a good idea or a bad idea, that Congress has plenary power to do what it pretty much pleases in these areas and I don't pretend otherwise.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Goodlatte.

The gentleman from Virginia, Mr. Scott, is recognized for an additional question.

Mr. SCOTT. Mr. Chairman, I would ask Judge Carnes to convey that last sentiment to the Supreme Court. [Laughter.]

Judge CARNES. I am a member of what the Supreme Court is glad to call the inferior courts, so that is my position, anyway. [Laughter.]

Mr. SCOTT. Is there, Judge Carnes, in your regulations a presumption that conduct would not be part of the bond unless there is a specific public safety threat?

Judge CARNES. Or unless it is necessary—my understanding—or unless it is necessary to increase the likelihood of appearance. For example, stay away from drugs and alcohol may result in the person not appearing. Stay away from convicted felons. Come home every night by 11 o'clock and phone your probation officer recording, automated system, that sort of stuff. That is a hybrid of public safety and protection and it is also to increase the likelihood of appearance.

Mr. SCOTT. Then you have enumerated—how different are they from the kinds of conditions that you would put on a suspended sentence?

Judge CARNES. Supervised release is what we have more in Federal court than—I am certainly familiar with suspended sentences from State court, and actually, they can be very similar, very similar, and sometimes they are carried over, to be quite frank with you.

Mr. SCOTT. Did I understand you to say that 95 percent of the country doesn't have conduct as a condition of release?

Judge CARNES. If I said that, I didn't mean to. My understanding of the results of the survey was that in a majority, perhaps a large majority of the 94 districts, it wasn't used. But in some districts, it was used and they feel it is very effective and feel very strongly about it.

Mr. SCOTT. If you are not using it in most of the country—is there an eighth amendment problem, so if you do not need it in most of the country, it would be excessive in the other parts of the country where it is used?

Judge CARNES. Well, of course, you could look at it as it is not being used some places it is needed. I don't know, and would like to know, but can't——

Mr. SCOTT. I guess that is just a theoretical kind of question.

Judge CARNES. I can't tell you if the variations are because of the different mix of crimes. Some places are military base extensive and some aren't, and you tend to have more domestic violent kinds of crimes there where you are trying to separate the defendant. I don't know if that tracks the use of this or not.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Scott.

We appear to be going into a second round of questions, so I will recognize the gentleman from Georgia, Mr. Barr, for additional questions, as well, and then we will go to the gentlewoman from Texas.

Mr. BARR. Thank you, Mr. Chairman.

I think that Mr. Scott was getting at a question that I was going to ask, also, and that is given the fact that we have this disparity among how the different districts, district courts, either use or don't use condition performance bonds or condition bonds, do you see, Judge, any problem with any unequal protection or due process or what not in that different treatment?

Judge CARNES. I really don't, because I don't think you are constitutionally entitled to the lowest common denominator of restrictions. One thing I would remind you of, and I don't have the data on this and don't pretend I do, but in some districts, there may be fewer releases because they are not using these conditions tied into the bond.

We do have some anecdotal evidence from some of the magistrate judges that the defendants have actually urged them to put conditions on me and make it part of the bond because I want you to know I am going to obey those conditions. I promise you I will, and if you don't believe me, make it a condition of my bond. The defendants, at least in those cases, think that the judge is more likely to release the defendant if he has that added assurance that the de-

fendant is going to obey the conditions of release because of the bond being attached to it. It may be that fewer people are released in districts where they do not tie the conditions into the bond. I do not know.

Mr. BARR. Mr. Verrochi, do you have a copy of this?

Mr. VERROCHI. I just received it.

Mr. BARR. The one page, the types of bonds set for defendants' release. I think it is at the back of the Judge's written statement.

Mr. VERROCHI. I literally haven't read it, sir.

Mr. BARR. These are for 3 years, all post-Vacarro, 1999, 2000, and 2001. Just glancing at this, I am not quite sure what this tells us, if anything, other than just these are the numbers, and I am certainly sure they are accurate. Does it really tell us anything about the impact of Vacarro?

Mr. VERROCHI. In the year 2001, for example, with 88,000 cases activated, only 21,000 defendants were released. I have to assume that that is less than 25 percent that were actually released on bail. If you look, 1,500 of them, roughly, were corporate surety, out of a total of 88,000 cases. So the real question becomes, is the Federal court using bail in a way that the presumption of innocence allows a defendant to be on the street and work with his attorney for his defense leading up to his trial.

Judge CARNES. Could I clarify one thing about that table?

Mr. BARR. I would, and also, Judge, if you could, how would these figures compare to pre-1995, in other words, pre-Vacarro decision figures?

Judge CARNES. I don't have the pre-1995. This is what the AO was able to put together on very short notice. But one thing I wanted to clarify is as the third asterisk—three-asterisk footnote indicates, these include only the defendants released at the initial detention or review hearing, not in any subsequent hearing in which the defendant may have been able to come up with more collateral or more persuasive arguments about release. So this is not a final release figure.

Unfortunately, as you know, sometimes statistics aren't kept for policy purpose. They are just kept for a variety of reasons, and sometimes because that is the way they have always been kept. We don't have the statistics past the first detention or review hearing.

Mr. BARR. So they would not be available even if the AO had more time to——

Judge CARNES. The AO is trying hard to get those figures. We were told, first of all, that it would take a week or two, and then it would take days. As I understand it, we are making every effort. John Rabiej has reminded me that the figures we have for 2001, which approach it from the end looking back, shows that 38,000 folks were ultimately released. We don't have these numbers broken down any further than they are broken down. But my understanding is, the actual number released hovers around 50 percent, take or give 6 percent.

But you have got to remember, if you look in that report at the kind of cases we are talking about, 17 percent of them are immigration violation cases and there is no way the judge is going to release somebody who is in this country illegally to begin with. Forty percent of them are drug cases, serious drug cases to get into

Federal court. So you have got nearly 60 percent where there is a pretty heavy presumption that you ought not to release the defendant based on the nature of the crime.

Mr. BARR. Would it be possible, also, Judge, to go back and pull out similar statistics going back to the early 1990's so we could see if there has been any statistical change after 1995?

Judge CARNES. If it can be done, I am sure the AO will do it for us. I don't know when they started breaking down these statistics, but I am sure we will get that if it is possible, or you will get a letter saying it is not possible.

Mr. BARR. We would appreciate that. Thank you.

Mr. SMITH. Thank you, Mr. Barr.

The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Judge Carnes, let me follow up on the line of questioning, very briefly, of the gentleman from Georgia. When you said 60 percent, the figure 60 percent of those individuals, those are not ones that are released. You are talking about——

Judge CARNES. No.

Ms. JACKSON LEE [continuing]. Dangerous—all right. I want to move them away from our formula here.

Judge CARNES. Input cases.

Ms. JACKSON LEE. Obviously, you have the discretion to make the determination that there are obviously certain cases that are not within the bounds of the discussion that we are having here today.

I say that because I wanted to highlight for the record out of your report, The United States Probation Pretrial Services System Year-End Report, where you note that of those defendants released pending trial in fiscal year 2001, and again, we are saying of those released, so we are not talking about the hardship or the cases of individuals with heinous crimes and other major crimes, the large majority, 94 percent, appeared in court as required and were not rearrested.

Only 2 percent failed to appear for court proceedings and 2 percent each were revoked because they were either rearrested for a new felony charge or rearrested for a new misdemeanor. The release of 12 percent of defendants were revoked for technical violations of their release conditions. In these cases, a pretrial services officer before it reported to the court violations of conditions such as home confinement, refraining from drug or alcohol use, and travel conditions.

So I think this goes to Mr. Verrochi to the extent of the conditions, and I think, Judge, what I see clashing here is the court's discretion, which I am very sympathetic to and sensitive to, and the burden that falls on the innocent third party. So let me try to make an argument here using the eighth amendment, which specifically says excessive bail shall not be required.

If I was to take the opposite, it would seem to say that then bail should be required and we should have the privileges of bail on the grounds of a single issue, and that is appearance. Conditions, I believe, are important and clearly should be included. I do think that the conditions might equate to onerous or excessive by way of the penalty that is going to fall on the third party.

Let me move to Mr. Verrochi just to say, are you singly making the point about the onerousness or the burden on the innocent third party or are there other arguments that you are making in support of H.R. 2929?

Mr. VERROCHI. Ma'am, I believe that a court can set any kind of a condition on a defendant in addition to a financial condition, that the financial condition is a guarantee, it is a leverage, it is financial handcuffs that help me and help the family to make the defendant appear. All of the other conditions, be it abstinence from drugs, alcohol, curfews, et cetera, all of those other conditions are laid upon the defendant only, and if the defendant violates those conditions, the defendant should pay the penalty of having his bail revoked. That is a fair and just action by the court, because the defendant could not adhere to the conditions.

Ms. JACKSON LEE. And then he is rearrested or to come back into jail?

Mr. VERROCHI. Yes, ma'am.

Ms. JACKSON LEE. His freedom is extinguished.

Mr. VERROCHI. He gives up his freedom because he violated the conditions. As long as he appears in court, I or his family should not have to give up our money, which is the guarantee of appearance. The conditions is a guarantee of behavior and that should be laid solely on the defendant.

Ms. JACKSON LEE. I would almost think that you could stretch the eighth amendment to say that you were exercising cruel and unusual punishment against the bondsperson and the family by causing them to lose their financial stake when all they have done is tried to help a loved one, in most instances.

Mr. VERROCHI. Yes, ma'am.

Ms. JACKSON LEE. Would you accept that premise?

Mr. VERROCHI. I will accept that premise and I will say to you that I truly don't believe that family members understand the risk that they are running when they post cash or a home or something like that. They don't understand that a violation of conditions could mean the loss of their money or their home.

Ms. JACKSON LEE. Let me just say to Judge Carnes, you are doing a very able job of representing the Conference. I had the opportunity of being with the Just Beginning Foundation just a few weeks ago of Federal judges who happened to be African American judges and we discussed a lot of these issues.

How would you respond to the point that is being made that you still have the power of withdrawing the freedom of the defendant if they violate the conditions. But if you have this added measure of punishment, you are not punishing the defendant, who has nothing. You are punishing the family members, and to a certain extent, some family members have lost their property or will lose their property if you revoke the bond. Could you respond to that, please?

Judge CARNES. That is a good question, and my response is that the rule contemplates those kind of hardships and says, if it otherwise appears that justice does not require the forfeiture, the judge can set it aside or can remit part of it. But we are talking about innocent family members, but H.R. 2929 does not distinguish between innocent and guilty family members. I am telling you, we

have cases all the time in drug cases, while Mom and Pop are sitting in the house, Junior is running a meth lab out in the barn and they know about it and they are not innocent and they could influence his behavior.

The thought is of custodial sureties, which is often the family situation, or friends, that they are in a position to influence the behavior or to report it. I do not know any judge in the country, if someone came in and said, "I am sorry. I put up the bond for this, but he is dealing drugs again. I want off the bond," and reported him, there is no judge in the country would forfeit that bond. Those people are in a position to be aware of, to attempt to influence the behavior, and to report it if they can't change it. And if they can't do that, that ought to be taken into account and set aside the forfeiture or remit part of the forfeiture.

Ms. JACKSON LEE. Mr. Chairman, Judge Carnes has again ably responded. I would only say that it is a question of having the data to be able to support the representation, and certainly I believe in the integrity of the Federal court, but I think we are trying to address those instances where it falls through the cracks and innocent persons are harmed, and I believe that there is merit in the legislation.

Mr. SMITH. Thank you, Ms. Jackson Lee.

I will exercise a chair's perogative here, and Mr. Verrochi, if you want to have equal time and respond to the question, as well, you are welcome to, and we will give you a minute to do so.

Ms. JACKSON LEE. Thank you.

Mr. VERROCHI. I think that, quite clearly, if the meth lab is out in the backyard, that the Federal prosecutor is going to start a civil forfeiture proceeding to forfeit that property because the family truly is involved. But I believe that in most instances, the family, particularly when it is Grandma or someone who is away from the local defendant, when that occurs, that more distant relative obviously should not suffer a penalty. They are the innocent third party.

I go into a bail bond with my eyes open and I understand the risks which the judge is laying out for us, and the risks for me in the Federal court today are that I cannot write bail in the Federal court because I cannot guarantee the conduct of the defendant. I am willing, quite willing, to guarantee the appearance of the defendant. That is my job, and if he does not appear, I will make him appear, and if I can't make him appear, then I will pay the forfeiture.

Mr. SMITH. Thank you, Mr. Verrochi.

I would like to thank all the Members for their presence and for their interest in the subject at hand. Judge Carnes, thank you for your testimony. Mr. Verrochi, thank you for yours, as well. It has been very enlightening and we appreciate what you had to say.

The Subcommittee stands adjourned.

[Whereupon, at 5:20 p.m., the Subcommittee was adjourned.]

# APPENDIX

## MATERIAL SUBMITTED FOR THE HEARING RECORD

### PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

This legislation restores the historical purpose of bail bonds to their original purpose. It grants judges the authority to declare bail bonds forfeited only when a defendant fails to appear before a court as ordered.

The historical purpose of bail has always been to ensure that defendants physically appear before a court. In the past, bail bonds have been used only for this purpose. Recently, however, bail bonds have taken on a new purpose. Federal judges have now merged the purposes of bail and other conditions of release. This requires the Bail Agent to not only ensure the defendant's presence at court but also his general good behavior. This puts on undue strain on the court system in general and the Bail Agents in particular.

Judges are now ordering bonds forfeited in cases where the defendant actually appears before a court as ordered but fails to comply with some collateral condition of release. This is a misinterpretation of the purposes of bail bonds that must be addressed in order to correct the runaway costs of the system.

This expansion of the purposes of the bail bonds has led to a breakdown in the system. The risk to the bail agent has increased, and the industry has been forced to adhere to strict underwriting guidelines. As a result, there is no longer a meaningful bail bond option. There is no incentive for people who have already had their bail bonds forfeited to appear before court, and so we have thousands of defendants failing to appear for court appearances. This vastly increases the expense and effort expended by Federal law enforcement officers. There is no need for this increase when we can very easily fix this problem by restoring the original purpose of bail bonds.

This bi-partisan bill is a step worth considering to reform our judicial system. We must make the system more efficient so as to better provide swift justice to those going through the system.